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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ....., ORIGINAL.

STATE OF LOUISIANA,
Plaintiff,

against

CLAUDE CUMMINS, CLARENCE R. BIRCH, DREDGING REALIZATION CORPORATION, STANDARD DREDGING CORPORATION and ABRAHAM L. SHUSHAN,
Defendants.

OPPOSITION TO THE MOTION OF THE STATE OF LOUISIANA FOR LEAVE TO FILE COMPLAINT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now Claude Cummins, Clarence R. Birch, Dredging Realization Corporation, a corporation of New Jersey, and Standard Dredging Corporation, a corporation of New Jersey, sought to be made defendants in the above entitled cause, and in response to the rule to show cause issued herein on June 9, 1941, oppose the motion of the State of Louisiana for leave to file its complaint in this Court on the following grounds:

1. The Court would be without original jurisdiction because the cause of action, if any, asserted in the proposed complaint is vested in the Board of Levee Commissioners

of the Orleans Levee District, which is a political corporation and a legal entity entirely distinct from the state.

2. The Court would be without jurisdiction because the matters set forth in the proposed complaint involve a controversy with defendant Shushan who is a citizen of the State of Louisiana. There is therefore no diversity of citizenship to support federal jurisdiction, and, since Shushan's rights are involved, the difficulty cannot be cured by dismissing as to him and proceeding in his absence.

3. The Court should in any event decline to take jurisdiction of the proposed case because it is brought by a state against citizens of other states simply for a money judgment, and there is no showing of the want of another forum.

WHEREFORE, with full reservation of all motions, pleas and defenses to the proposed complaint, the defendants respectfully pray that this Court deny the motion of the State of Louisiana for leave to file its proposed complaint herein.

September 29, 1941.

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Hibernia Bank Bldg., New Orleans, La.
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IN THE

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STATE OF LOUISIANA,
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CLAUDE CUMMINS, CLARENCE R. BIRCH, DREDGING REALIZATION CORPORATION, STANDARD DREDGING CORPORATION and ABRAHAM L. SHUSHAN,
Defendants.

BRIEF IN OPPOSITION TO THE MOTION OF THE STATE OF LOUISIANA FOR LEAVE TO FILE COMPLAINT.

Statement.

The State of Louisiana has annexed to its motion papers its proposed complaint. In this it is alleged that on March 6, 1931, a contract for filling marsh land to make an airport was entered into between the Board of Levee Commissioners of the Orleans Levee District (hereinafter called the Levee Board) acting through its president, Abraham L. Shushan, and the Orleans Dredging Company, Inc., and that this contract was performed by the dredging company's making a fill of approximately 6,479,780 cubic yards of earth, for which it was paid at the stipulated price

of 13.9 cents per cubic yard. It is further alleged that for the purpose of inducing his favorable action on said contract defendant Shushan was bribed in an amount upwards of $130,000 by representatives of the dredging company. Because of this the complaint seeks to recover back all or some part of the compensation paid to the dredging company under the contract, as well as the alleged bribe.

The defendants against whom redress is sought are, besides Shushan, Standard Dredging Corporation, which is alleged to have been the parent company of Orleans Dredging Company, Inc., Dredging Realization Corporation, which is alleged to have taken over the assets of Orleans Dredging Company, Inc., when the latter was dissolved some time ago, and two individuals, Cummins and Birch, who are alleged to have been officers of Orleans Dredging Company, Inc., and its parent at the time of the matters complained of.

The two corporate defendants are alleged to be New Jersey corporations with their principal places of business located in the City of New York. Cummins is alleged to be a citizen of California resident in the City of New York, and Birch is alleged to be a citizen of New York resident in New York. Defendant Shushan is alleged to be a resident and citizen of Louisiana. There is, therefore, a lack of diversity of citizenship between plaintiff and defendant Shushan.

POINT ONE.

THE CAUSE OF ACTION, IF ANY, ALLEGED IN THE PROPOSED COMPLAINT IS VESTED IN THE LEVEE BOARD, AND NOT THE STATE OF LOUISIANA, AND THE CASE, THEREFORE, IS NOT WITHIN THE ORIGINAL JURISDICTION OF THIS COURT.

The contract for the airport fill which forms the subject matter of the proposed complaint was entered into on March 6, 1931, between The Board of Levee Commissioners of the Orleans Levee District (hereinafter called the Levee Board), party of the one part, and Orleans Dredging Company, Inc., party of the other part. This Levee Board, as the proposed complaint alleges in Article IV, was created pursuant to Louisiana Act 93 of 1890. Section 3 of that act, which remains unrepealed and unamended to date, reads as follows:

> "That said commissioners shall constitute and be styled 'The Board of Levee Commissioners of the Orleans Levee District', and as such are hereby constituted and created a body politic, with needful succession and corporate powers; shall have power to sue and be sued in their corporate name; shall have a common seal, and shall have the franchise and power to do and perform all the purposes of this act; and to acquire, hold, own and convey all the property, real and personal, needful in the premises, and to alienate, mortgage and pledge the same for said purposes.
>
> "The domicile of this Board shall be in the City of New Orleans, where it shall be suable; and service of citation shall in all cases be made upon its President."

The particular authorization for the airport construction in question is, as alleged in Article VI of the proposed

complaint, found in an amendment to the Louisiana Constitution adopted November 4, 1930 (Art. 16; Sec. 7b—the proposed complaint says Sec. 76, but this is apparently a misprint for Sec. 7b).

At the same time, the Constitution was amended by adding to Article 16 a Section 7a which provides that:

> "The Board of Levee Commissioners of the Orleans Levee District shall have and exercise all and singular the powers now conferred upon said Board by law, as well as such powers as are herein granted."

Thus by constitutional sanction the powers of the Levee Board were put beyond the authority of the legislature to alter or repeal.

In this situation it is the firmly settled law of Louisiana that the Levee Board, though an agency of the state, is a legal entity wholly apart from the state, and that consequently a cause of action arising from board affairs rests with the board, and cannot be sued upon by the state. *State* v. *Tensas Delta Land Co.*, 126 La. 59; 52 So. 216 (1910); *State* v. *Standard Oil Co.*, 164 La. 334; 113 So. 867 (1927). In the former case the court said on page 72 (126 La.):

> "The argument that the said board is nothing more than a mere agency or instrumentality of the state, and that therefore the state may sue in every case where the said board might sue, contains a manifest non sequitur. Every city, town, and parish of the state is a mere agency or instrumentality of the state; but no one would venture to say that the Attorney General could ignore the existence of these corporations and enforce, in the name of the state, any cause of action which any of them might have."

and in the latter case on page 357 (164 La.):

> "The board is a state agency, of course, just as any other subdivision incorporated by an act of the Legislature is a state agency; but the board has the right to sue and be sued, and it alone must assert its rights of action. The Attorney General has no right to sue for and in the name of the state on a cause or right of action possessed only by the levee board."

In *Board* v. *Hardtner,* 164 La. 632; 114 So. 494 (1927) the point was pushed a little further and it was held that a levee board could bring a suit against state officers and set aside a sale of the board's property that these officers had purported to make in behalf of the state, and in *Saint* v. *Allen,* 172 La. 350; 134 So. 246 (1931) it was held that the Louisiana Highway Commission, which, like the levee boards, was a political corporation, was empowered to employ its own legal staff free from control of the Attorney General. In this latter case the court said (172 La. 360):

> "The commission, in our opinion, is a distinct legal entity from the state. Section 3 of Act 95 of 1921 (Ex. Sess.) makes it a body corporate, with power as such to sue and be sued. It is an agency of the state, and not the state itself, created for the purpose of executing certain duties, devolving primarily upon the state. In a general sense, in its relations to the state, it is not dissimilar to levee districts, which are bodies corporate, created for the purpose of constructing and maintaining levees, which are duties devolving primarily upon the state. It was held in *State* v. *Standard Oil Co.,* 164 La. 334, 357, 113 So. 867, and in *State* v. *Tensas Delta Land Co.,* 126 La. 59, 52 So. 216, that a levee district, though the creature and agency of the state, had, as long as it was permitted to exist, a separate existence from the state, and that the state could not sue on causes of action accruing to the district."

Louisiana v. *Jack*, 244 U. S. 397 (1917), arose as a sequel to the *Tensas* case and in its decision this Court recognized and gave full faith to the rule above announced.

There cannot, therefore, be the slightest doubt that the cause of action, if any, set forth in the proposed complaint is vested in the Levee Board and not in the State of Louisiana.

But, the proposed complaint alleges, the state is proceeding through its newly formed State Crime Commission under authority of Louisiana Act 13 of 1940.

Section 3b of Act 13 of 1940 does, as the state's brief points out, authorize representatives of the Crime Commission to bring civil proceedings in the name of the State of Louisiana for recovery of any moneys, etc. that may have been diverted from the state, and it is true, as the state's brief says, that Section 2 of the act defines the word "State" as including all public boards and commissions. What the state's brief fails to point out, however, is that this authority to bring suits is limited to suits at Baton Rouge or at the domicile of the defendants. The second paragraph of Section 3b reads as follows:

> "That any suit filed under the provisions of this Act may be instituted in the Nineteenth Judicial District, Parish of East Baton Rouge, Baton Rouge, Louisiana, or at the domicile of the defendant, or any one of the defendants named in such suit, at the discretion of the Commission, and shall be tried by preference and before any and all other civil proceedings. The Commission is empowered, whenever it believes such course necessary or desirable, to commence any such civil proceedings by attachment of any property of the defendant or defendants, without the necessity of posting bond."

A suit in the Supreme Court of the United States is clearly not authorized by Act 13 of 1940.

Notwithstanding this, we move to broader ground. For purposes of argument we may assume that either through Act 13 of 1940 or some other legislation the State of Louisiana has been authorized to sue on the Levee Board's cause of action.

Having regard to the constitutional amendment above referred to, the effect of this would not and could not be to shear the Levee Board of its powers or to divest it of its cause of action. The state would merely be constituted as collecting or enforcing agent, and the Levee Board would necessarily remain as owner of the cause of action.

In *Louisiana* v. *Jack, supra,* the Louisiana legislature, in an effort to circumvent the holding of the *Tensas* case, passed a statute by which it was "hereby made the duty of the Attorney General of the State, upon the request of the Governor to represent the State or any political agency or subdivision thereof, in any suit in any court involving title to any land or real property belonging to the State of Louisiana or any of its political agencies or subdivisions, whether the title to said land or real property is vested in or appears in the name of the State or in the name of any of its political agencies or subdivisions". This Court held that notwithstanding this statute, the levee board still owned the cause of action, and could compromise it.

In *People* v. *Wood,* 121 N. Y. 522, 530 (1890), a similar statute of New York was involved, and it was held that the state sued merely as agent or representative of the defrauded political subdivision, and that the case would be determined by the same principles as though the political subdivision had brought it directly.

Even if we assume, therefore, that the State of Louisiana is rightfully here, nevertheless, it can only sue as the rep-

resentative or agent of the Levee Board, and the Supreme Court will have no original jurisdiction.

Were this not so, the original jurisdiction of the Supreme Court could be invoked simply by the expedient of having a state legislature pass a law appointing the state trustee or agent for purpose of bringing suit, and thus the original jurisdiction of the Court would be made to depend on the will of state legislatures. Certainly this was never intended.

In *Oklahoma* v. *Cook,* 304 U. S. 387 (1938), Oklahoma on relation of its Bank Commissioner asked leave to bring a suit in this Court's original jurisdiction to enforce stockholders' liability to an insolvent state bank. In the Oklahoma Banking Law it was provided that the Bank Commissioner was authorized "to prosecute all suits necessary for the liquidation of the assets of the insolvent corporations taken over by him" and that such suits were to be brought "in the name of the State of Oklahoma, on the relation of the Bank Commissioner". This Court held that it would have no jurisdiction saying that to bring a case within the original jurisdiction it was not enough that a state was plaintiff or that it had acquired legal title to the cause of action if the beneficial interest was elsewhere.

In *New Hampshire* v. *Louisiana,* 108 U. S. 76 (1882), original jurisdiction was refused of a suit sought to be brought by the State of New Hampshire to collect on bonds of Louisiana which had been assigned to the state pursuant to a statute which provided that citizens of New Hampshire might assign their bonds to the state for purposes of bringing suit. The decision was based on the ground that the state would be acting for others in prosecuting the case.

In *Kansas* v. *U. S.,* 204 U. S. 331 (1907), it was held that Kansas could not invoke the original jurisdiction of

the Supreme Court where the action was brought for the benefit of a railroad.

In *Oklahoma* v. *A. T. & Santa Fe Ry.*, 220 U. S. 277 (1911), the state sought to enjoin the enforcement of certain railroad rates by the defendant. Jurisdiction was denied on the ground that the state had no property interest in the litigation as a corporate body itself, and no standing to represent such of its citizens as might be shippers.

In *Missouri* v. *Illinois*, 180 U. S. 208 (1901), the Supreme Court took original jurisdiction of an action to restrain the commission of a nuisance which would have threatened several large municipalities of the plaintiff state. The Court emphasized, however, that more was at stake than the mere welfare of one or two communities saying (p. 241):

> "The health and comfort of the large communities inhabiting those parts of the State on the Mississippi River are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves through the territory of the State."

In *Louisiana* v. *Texas*, 176 U. S. 1 (1900), original jurisdiction was refused of a suit to restrain the enforcement of Texas quarantine regulations to the alleged damage of citizens of Louisiana. In a concurring opinion, Brown, J., said on page 28:

> "* * * The controversy is not one in which the citizens of Louisiana generally can be assumed to be interested, but only the citizens of New Orleans, and it therefore seems to me that the State is not the proper party complainant."

In its brief attached to the motion papers, the plaintiff makes no effort to avoid the rule of the decisions just quoted other than to cite *State* v. *Walmsley*, 181 La. 597; 160 So. 91 (1935), which is a Louisiana case that has no bearing on

the question of the Supreme Court's original jurisdiction, and to reiterate the statement that the fisc of Louisiana has been damaged.

If by saying that the fisc has been damaged the plaintiff means that the State Treasury has been damaged, the statement cannot be accepted, because it is abundantly clear from Article 16, Section 7, of the Louisiana Constitution, pursuant to which the airport was constructed, that the Levee Board's funds were entirely separate from the state's funds. If, however, all that is meant is that the state as *parens patriae* is damaged whenever its citizens or agencies are damaged, then the statement is unexceptionable enough, but it is quite insufficient to show the state's interest as party plaintiff.

The Orleans Levee Board is only one out of some 22 levee boards in the state. It is only one out of countless political corporations in the state. Should the Court entertain this suit, brought by the state for the benefit of its minor agency, the Court would, by the precedent so established, have to entertain suits arising out of the activities of any city, village, levee board or what not that the state should choose to sue for.

POINT TWO.

THE PRESENCE OF SHUSHAN, A CITIZEN OF LOUISIANA, AS DEFENDANT PREVENTS THE COURT FROM HAVING JURISDICTION, BUT, SINCE SHUSHAN'S RIGHTS ARE INVOLVED IN THE CONTROVERSY, THE DIFFICULTY CANNOT BE CURED BY DROPPING HIM AS DEFENDANT AND PROCEEDING IN HIS ABSENCE.

The controversy as alleged in the proposed complaint involves the defendants here appearing, citizens of states other than Louisiana, who are alleged to have paid the

bribe and enjoyed its fruits, the defendant Shushan, a citizen of Louisiana, who is alleged to have received the bribe, and the State of Louisiana as plaintiff, which, we assume for purposes of this argument, is alleged to have been damaged.

The presence of Shushan as defendant prevents a complete diversity of citizenship and the result is that the Supreme Court would not have jurisdiction. This is the rule of an unbroken line of authorities. *Pennsylvania* v. *Quicksilver Co.*, 10 Wall. 553 (1871); *California* v. *Southern Pacific Co.*, 157 U. S. 229 (1895); *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199 (1902); *New Mexico* v. *Lane*, 243 U. S. 52 (1917); *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158 (1922); and others.

The attempt of the state to invoke the doctrine of separable controversy so as to avoid the effect of this rule is ingenious, but it hardly needs answering.

A *defendant* may, if there be a separable controversy involving him in which the diversity of citizenship is complete, remove the case to a federal court notwithstanding that there are other controversies where the diversity is not complete. This is for the obvious reason that a plaintiff should not be able to deprive a defendant of his resort to the federal court by the mere device of joining something else onto the complaint.

But to turn the thing around so that the effect of it would be to allow a *plaintiff* to bring a suit in the federal jurisdiction when there is not diversity of citizenship, by the expedient of merely joining some other separable controversy onto the complaint, would be to open the federal courts to every kind of case that any ingenious pleader wished to bring. One will search *Ohio* v. *Helvering*, 292 U. S. 360 (1934), and indeed all other authority, in vain for support of any such astonishing proposal.

However, on page 5 of its brief the state invites the Court to strike Shushan as defendant, and then entertain the suit.

This is exactly the situation that arose in *California* v. *Southern Pacific Co., supra.* There the state brought a bill in equity against the railroad to clear title and recover possession of certain water front property that the railroad occupied. In the course of the trial it became apparent that the City of Oakland, and the Oakland Water Front Company, both California corporations, were interested in the controversy since it was through a grant from the state to these corporations that the railroad claimed its rights, and the validity of that grant was, therefore, in issue. This Court held that by reason of the finality of its own decisions it was not appropriate that it should exercise its original jurisdiction where the rights of absent parties were involved, even though the absent ones were not indispensable parties to the case and even though they would not be bound by the decision. On page 257 (157 U. S.) the Court says:

> "We have no hesitation in holding that when an original cause is pending in this court to be disposed of here in the first instance and in the exercise of an exceptional jurisdiction, it does not comport with the gravity and finality which should characterize such an adjudication to proceed in the absence of parties whose rights would be in effect determined, even though they might not be technically bound in subsequent litigation in some other tribunal."

Since the joinder of Oakland and the water front company would have divested the court of jurisdiction under the rule mentioned above, the case was dismissed.

Apparently realizing that *California* v. *Southern Pacific Co.* is an insurmountable obstacle, the state in its brief rests

heavily on the dissenting opinion in that case. This, we suppose, is tantamount to a request that the holding be overruled.

It is true that *California* v. *Southern Pacific Co.* was a hard case, and there is force in what the dissenting judge wrote. But the primary question involved, there as here, was a question of the state's domestic political conduct, and to permit the state, by the device of involving outsiders, to resort to the Supreme Court for the purpose of resolving disputes among its own political subdivisions and their officers, and in their absence too, would surely be as unwise as it would be fraught with trouble.

We respectfully submit that the trial under the exceptional jurisdiction of the Supreme Court of an issue of bribery between a state and its own public servant, and in the absence of the public servant too, would neither "comport with the gravity and finality which should characterize such an adjudication", nor would it comport with the dignity of the Court.

POINT THREE.

THE COURT SHOULD DECLINE JURISDICTION OF THE PROPOSED ACTION UNDER THE RULE OF *Massachusetts* v. *Missouri*, SINCE IT IS BROUGHT BY A STATE AGAINST CITIZENS OF OTHER STATES SIMPLY FOR A MONEY JUDGMENT, AND THERE IS NO SHOWING OF THE WANT OF ANOTHER FORUM.

The complaint which the State of Louisiana proposes to file in this proceeding is characterized by the state as one in equity, on a cause of action for which the plaintiff alleges it has no adequate remedy at law. In truth and in fact, however, the essence of the alleged cause of action is simply a declaration for money had and received, and the ultimate

relief for which the state prays is merely a judgment for money.

The alleged multiplicity of suits to be avoided arises on the suggestion of the state that unless the jurisdiction of the Supreme Court is invoked, it will have to sue the defendant Shushan in Louisiana and the other defendants elsewhere. As it is alleged, however, that all the other defendants are present in New York, only one other suit would be necessary, and certainly two suits are not such a multiplicity as to justify a bill in equity. *Empire Engineering Corp.* v. *Mack*, 217 N. Y. 85 (1916); *Kohlhamer* v. *Smietanka*, 239 Fed. 408 (1917).

In 1886 this Court held in *Buzard* v. *Houston*, 119 U. S. 347, that a bill praying for discovery and for rescission and cancellation of a contract on the ground of fraud, coupled with a money demand and various alternative and additional claims, was nevertheless an action at law triable by jury and not maintainable as a suit in equity, since "a judgment for pecuniary damages would adjust and determine all the rights of the parties, and is the only redress to which the plaintiffs, if they prove their allegations, are entitled" (p. 353).

More recently in *U. S.* v. *Bitter Root Development Co.*, 200 U. S. 451 (1906), this Court held that neither a demand for an accounting, the necessity of discovery, nor even an alleged multiplicity of suits would support a bill in equity when the relief sought was merely a judgment for money. The equitable remedies prayed for, said this Court, could all be made available incidentally in an action at law; and as to the alleged multiplicity of suits: "Those persons who were guilty of the wrong must be made parties in either court, in order to bind them. Such alleged multiplicity is not avoided in one court more than in the other" (p. 479).

In *Curriden* v. *Middleton*, 232 U. S. 633 (1914), it was held that an action for damages arising out of a conspiracy

to defraud is justiciable at law and not in equity, even though the prayer for relief seeks discovery.

It is clear, therefore, that the proposed action is simply one at law, seeking recovery of money, and that the defendants are entitled to a jury trial even if the case be proceeded with in the Supreme Court. 28 U. S. C. 343.

In this exact situation, i. e., where a state seeks to bring an action at law against citizens of other states, the Court has ruled that it will not take original jurisdiction in the absence of special facts to show the want of another forum. *Massachusetts* v. *Missouri,* 308 U. S. 1 (1939) where it was said (p. 18):

> "In the exercise of our original jurisdiction so as truly to fulfill the constitutional purpose we not only must look to the nature of the interest of the complaining State—the essential quality of the right asserted—but we must also inquire whether recourse to that jurisdiction in an action by a State merely to recover money alleged to be due from citizens of other States is necessary for the State's protection. In *Oklahoma* v. *Cook, supra,* we called attention to the enormous burden which would be imposed upon this Court if by taking title to assets of insolvent state institutions, including claims against citizens of other States, a State could demand access to the original jurisdiction of this Court to enforce such claims. To open this Court to actions by States to recover taxes claimed to be payable by citizens of other States, in the absence of facts showing the necessity for such intervention, would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it. We have observed that the broad statement that a court having jurisdiction must exercise it (see

Cohens v. *Virginia,* 6 Wheat. 264, 404) is not universally true but has been qualified in certain cases where the federal courts may, in their discretion, properly withhold the exercise of the jurisdiction conferred upon them where there is no want of another suitable forum. *Canada Malting Co.* v. *Paterson Co.,* 285 U. S. 413, 422; *Rogers* v. *Guaranty Trust Co.,* 288 U. S. 123, 130, 131. Grounds for justifying such a qualification have been found in 'considerations of convenience, efficiency and justice' applicable to particular classes of cases. *Rogers* v. *Guaranty Trust Co., supra.* Reasons not less cogent point to the need of the exercise of a sound discretion in order to protect this Court from an abuse of the opportunity to resort to its original jurisdiction in the enforcement by States of claims against citizens of other States."

In the instant case there is no showing whatever of lack of an adequate forum. On the contrary, the State of Louisiana can certainly pursue Shushan in its own courts, and as to the other defendants it can come to New York. *Delafield* v. *Illinois,* 2 Hill. 159, and 26 Wend. 192 (1841). There is not the slightest need to invoke the exceptional jurisdiction of the Supreme Court of the United States.

September 29, 1941

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. ———, ORIGINAL.

STATE OF LOUISIANA, *Plaintiff*,

versus

& CLAUDE CUMMINS, ET AL., *Defendants*.

OPPOSITION TO GRANTING OF LEAVE TO FILE COMPLAINT

and

BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ———, ORIGINAL.

STATE OF LOUISIANA, *Plaintiff*,

versus

CLAUDE CUMMINS, ET AL., *Defendants*.

OPPOSITION TO GRANTING OF LEAVE TO FILE COMPLAINT

Comes now Abraham L. Shushan, sought to be made one of the defendants in the above entitled cause, and, in response to the rule to show cause issued herein on June 9, 1941, opposes the motion of the State of Louisiana for leave to file its original complaint in this Court herein, on the following grounds, supported in the accompanying brief:

1—This Court is without jurisdiction of this cause,

a—Because the State of Louisiana is neither a real nor the proper party complainant therein;

b—Because the action involves, in any event, claims against this opponent, a citizen of Louisiana, as a necessary and indispensable party thereto.

2—This Court should decline to take jurisdiction of this cause, because it is not a suit in equity, but is a simple action at law for an ordinary money demand, required to be tried by jury.

WHEREFORE, with full reservation of any and all pleas and defenses to the proposed complaint, appearer prays that this Court deny leave to the State of Louisiana to file its original complaint in this Court herein.

BON GEASLIN,
Washington, D. C.,
Attorney for Appearer.

Washington, D. C.,
September 29, 1941.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ———, ORIGINAL.

STATE OF LOUISIANA, *Plaintiff*,

versus

CLAUDE CUMMINS, ET AL., *Defendants*.

BRIEF IN SUPPORT OF OPPOSITION.

The opposition of the proposed defendant to the application for leave to file the complaint, is based on both a want of constitutional jurisdiction of this Court to entertain such a cause, and on an alternative plea to decline to entertain the cause even though technical jurisdiction may exist.

1—This Court is Without Jurisdiction of this Cause,

a—Because the State of Louisiana is neither a real nor the proper party complainant therein.

The proposed complaint involves an action for damages representing sums of which the proposed defendants are alleged to have defrauded the Board of Levee Commissioners of the Orleans Levee District (to which reference is herein made simply as the Levee Board). It is the position of this proposed defendant that the State of Louisiana, as such, has no interest in the matter, and is neither a real nor a proper party complainant in such an action.

The Levee Board was created by Act of the Legislature of Louisiana,[1] which gave the Board all needful corporate powers, including the right to sue and be sued in its corporate name.[2] These powers were given subsequent constitutional sanction and perpetuity,[3] thus placing them beyond the authority of the legislature to alter or repeal.

The direct point as to the right of the State of Louisiana to sue on causes of action vesting in the Levee Boards of the State, was decided adversely to that contention by the Supreme Court of Louisiana in 1910.[4] The case involved an action to set aside a sale of land by one of the Levee Boards, and to obtain restitution, on the ground that the sale was a fraudulent one through collusion of members of the Board with the purchasers. The Court held that although the Levee Boards of Louisiana are agencies of the State, "no one would venture to say that the Attorney General could ignore the existence of these corporations and enforce, in the name of the State, any cause of action which any of them might have."[5]

The statute under which the proposed complaint is sought to be filed,[6] provides for a recovery "in the name of the State of Louisiana" of "any claim of the State for any" money or property fraudulently diverted "from the State".[7] In the case last cited,[8] the Supreme Court of Louisi-

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[1] Louisiana Act 93 of 1890.

[2] *Ibid.*, Section 3.

[3] "The Board of Levee Commissioners of the Orleans Levee District shall have and exercise all and singular the powers now conferred upon said Board by law, as well as such powers as are herein granted." Art. 16, sec. 7(a), La. Const. of 1921, as amended by Act 4 of the Ex. Sess. of 1930, adopted November 4, 1930.

[4] *State* v. *Tensas Delta Land Co.*, 126 La. 59 (1910).

[5] *Ibid.*, at p. 71.

[6] Louisiana Act 13 of 1940.

[7] Sec. 3(b). The statute also provides that the word "State" as therein used, includes "all public boards and commissions, all public corporations or authorities," etc., etc. Sec. 2.

[8] *State* v. *Tensas Delta Land Co.*, *supra*, Note 4.

ana held that such a recovery by the State, of assets given by statute to the Levee Board, would "frustrate and nullify an admittedly valid statute." In the instant case, the assets involved have been placed in the hands of the Levee Board by constitutional provision,[9] so that the legislature could not in any event deprive the Board thereof; thus giving added force to the right of the Levee Board alone—to the exclusion of any such right in the State as such—to seek judicial recovery of the assets.

Following the decision of the Supreme Court of Louisiana in the case of *State* v. *Tensas Delta Land Company, supra,* denying the right of the State to sue on a claim of one of its Levee Boards, the Louisiana legislature enacted a statute[10] authorizing the Attorney General, for and in behalf of the State, to enter proceedings involving real property "belonging to the State of Louisiana or any of its political agencies or subdivisions, whether the title to said land or real property is vested in or appears in the name of the State, or in the name of any of its political agencies or subdivisions".

After the enactment of this statute, an attempt was again made by the Attorney General of Louisiana to control, in behalf of the State as such, subsequent litigation involving the same land of the Levee Board, and the same transaction, in which the suit of the State against the Tensas Delta Land Company had theretofore been dismissed. The case reached this Court in due course, and it was held[11] that the Supreme Court of Louisiana, in the case of Tensas Delta Land Company, had settled the law to the effect that "the State was without title or beneficial interest which would enable it to maintain a suit to set aside the sale alleged to be fraudu-

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[9] Art. 16, sec. 7(e) pg. 2, La. Const. of 1921, as amended by Act 4 of the Ex. Sess. of 1930, adopted November 4, 1930.

[10] Louisiana Act 3 of the Extra Session of 1930.

[11] *United States ex rel. Louisiana* v. *Boarman*, 244 U. S. 397 (1917).

lent"; that the Levee Board remained the only proper plaintiff in such an action; and that the purpose of the statute was simply to authorize the Attorney General, under certain circumstances, to act for and on behalf, and in conjunction with, the Levee Board in such a suit.[12]

The same point was again adjudicated by the Supreme Court of Louisiana in 1927, in a case involving an action by the State, in behalf of another of the Levee Boards, against certain oil companies for the value of oil produced from land owned by the Levee Board. The Court held,[13] that while the Levee Board is a state agency, "it alone must assert its right of action"; and that even under the statute of 1910 quoted above, "the Attorney General has no right to sue for and in the name of the State on a cause or right of action possessed only by the Levee Board"; and the Court expressly approved the decision of this Court in the case of *United States ex rel. Louisiana* v. *Boarman, supra.*[14]

Similarly, the Supreme Court of Louisiana has held that a provision of the Constitution of Louisiana to the effect that "prescription shall not run against the State",[15] nevertheless "applies to any or all other public corporations or agencies", the exemption being "confined to actions brought by and in the name of the State itself".[16]

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[12] See also: *Board of Comm'rs. of Tensas Basin Levee Dist.* v. *Hardtner*, 164 La. 632 (1927).

[13] *State* v. *Standard Oil Co.*, 164 La. 334, 357 (1927).

[14] *Ibid.*, at p. 368. As late as 1930, the Supreme Court of Louisiana reiterated its approval of the foregoing doctrine, in a case involving the same Levee Board as is involved in the proposed complaint in the instant proceeding. *Board of Levee Comm'rs.* v. *Whitney Trust & Savgs. Bk.*, 171 La. 28, 35 (1930).

[15] Constitution of Louisiana, Art. 19, sec. 16.

[16] *Board of Comm'rs* v. *Toyo Kisen Kaisha*, 163 La. 865, 867 (1927). This language was quoted with express approval as to a Louisiana Levee Board, on the ground that "it is a separate entity from the State, created by the State, it is true, to accomplish certain public purposes, but is nevertheless distinct from it." *Board of Comm'rs. of Caddo Levee Dist.* v. *Pure Oil Co.*, 167 La. 801, 812 (1929). See also: *Board of Comm'rs. of Tensas Basin Levee Dist* v. *Earle*, 169 La. 565 (1929); *Board of Levee Comm'rs. of Orleans Levee Dist.* v. *Whitney Tr. & Savgs. Bk.*, 171 La. 28, 35 (1930).

The Supreme Court of Louisiana has held time and again, in situations far stronger than that involved in the proposed complaint, that the State of Louisiana is not a proper party to a proceeding in which one of its agencies is the real and only party at interest. Thus, that Court has held[17] that even though contracts for highway improvements in Louisiana must, under the law, be made in the name of the State, suits on such contracts must "be instituted by the (Louisiana Highway) Commission and not by the State."[18]

The foregoing decision was quoted with approval by the United States Circuit Court of Appeals for the Fifth Circuit, in *Louisiana Highway Commission* v. *Farnsworth*,[19] holding that the federal courts have jurisdiction over suits against the Louisiana Highway Commission, on contracts made in the name of the State of Louisiana, such suits not being against the State.

It is accordingly respectfully submitted that the real party at interest in the controversy exhibited in the proposed complaint in the instant proceeding, is not the State of Louisiana, but is the Board of Levee Commissioners of the Orleans Levee District; and the State, not being the real or a proper party complainant in the proceeding, may not invoke the original jurisdiction of this Court.[20]

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[17] *Saint* v. *Allen*, 172 La. 350, 361 (1931).

[18] See also: *Murff* v. *Louisiana Highway Comm'n.*, 140 So. (La. App.-1932) 863.

[19] 74 F (2d) (CCA 5-1935) 910, cert. den., 294 US 729.

[20] Each state could really control the original jurisdiction of this Court, if by mere legislative action authorizing suits by its political subdivisions or others to be brought in its name, it might thus effectively grant leave to file such suits as original actions in this Court, and the number of such suits might well become legion. See *New Hampshire* v. *Louisiana*, 108 U. S. 76; *Oklahoma* v. *Cook*, 304 U. S. 387.

1—This Court is Without Jurisdiction of this Cause,

b—Because the action involves alleged claims against this opponent, a citizen of Louisiana, as a necessary and indispensable party thereto.

The proposed complaint names citizens of California, New York and New Jersey (all residents of New York), along with the present opponent, a citizen and resident of Louisiana, as defendants. It is averred that the controversy is separable as to the resident of Louisiana, and that the complaint might be dismissed as to him without affecting the proceedings against the other parties.

It is submitted, in the alternative, that even though the State of Louisiana may be held to be the proper party complainant, on the face of the proposed complaint and of the prayer, the relief sought against each of the defendants, including this appearer, a citizen and resident of Louisiana, is inextricably inter-woven with that sought against each of the other defendants, judgments being sought against all of them "*in solido*", with some relief[21] sought against this opponent alone. It is respectfully submitted that under these circumstances, this appearer, although a citizen of Louisiana, is both a necessary and indispensable party to the proceedings.

This Court has had repeated occasion to hold that its original jurisdiction may not be invoked, even by a State, in a proceeding against citizens of other States, when citizens of the complainant state are indispensable or necessary parties defendant to the action.[22] *A fortiori*, this Court can have no original jurisdiction of an action by a State against one of its own citizens.

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[21] Prayer, paragraph 5.

[22] See: *Pennsylvania* v. *Quicksilver Mining Co.*, 10 Wall. (77 U. S.) 553 (1871); *New Mexico* v. *Lane*, 243 U. S. 52 (1917).

The leading decision on the point is that of *California* v. *Southern-Pacific Company*.[23] In that case, as in the subsequent decisions, the citizen of the complainant state involved, had not actually been made a party defendant. The Court simply found that a citizen of the complaining state was a necessary party defendant, and since the proceeding could not go on without such citizen, and since the inclusion of such citizen as a defendant would oust the court's jurisdiction, the proceeding had to be dismissed.

In the instant case, the citizen of the complaining state, the present opponent, is made a party defendant to the proposed complaint, and the complainant merely states that if this Court should find that it is without jurisdiction under the circumstances, the controversy should be treated as a separable one, and that portion thereof directed against the citizen of Louisiana should alone be dismissed. In *California* v. *Southern Pacific Company, supra,* this Court held that in the exercise of its original "exceptional jurisdiction, it does not comport with the gravity and finality which should characterize such an adjudication to proceed in the absence of parties whose rights would be in effect determined, even though they might not be technically bound in subsequent litigation in some other tribunal"; and that "the bill must be dismissed for want of parties who should be joined, but cannot be without ousting the jurisdiction".[24]

It is not disputed that one who is not a party to an action is not technically bound by any judgment rendered therein. But as stated by this Court itself, an adjudication of a point by this Court necessarily carries such weight as in effect to adjudicate the rights of all persons, whether parties to the proceeding or not, in any subsequent litigation involving the same point, wherever such subsequent litigation might arise.

True, Mr. Justice Harlan dissented from the decision of the Court in *California* v. *Southern-Pacific Company, supra,*

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[23] 157 U. S. 229 (1895).

[24] *Ibid.*, at p. 257.

but his dissent was based rather on what he considered the fine-spun theory on which a State would be deprived of the right to invoke the original jurisdiction of the Supreme Court, simply because one of its citizens had, or might assert, some interest in the subject matter of that controversy.[25]

It is interesting to note that in a subsequent decision, this Court again dismissed such a proceeding, because citizens of the complainant state were necessary parties defendant to the action; and that Mr. Justice Harlan participated in the decision, and did not dissent therefrom.[26]

Similarly, in *Texas* v. *Interstate Commerce Commission*,[27] this Court held that if the citizenship of necessary parties to a proceeding is "such that they cannot be brought into the suit consistently with the limitations on our original jurisdiction, this does not justify us in proceeding in their absence".[28]

Finally, in *Pennsylvania* v. *West Virginia*,[29] while a majority of the Court held that certain citizens of the complainant states were not essential parties, and accordingly maintained the jurisdiction of the Court, Mr. Justice Brandeis (Mr. Justice Holmes concurring), dissented from the majority, on the express ground that since the citizens of the complainant states would not be bound by the decree in the suits, the Court should not entertain the proceeding. Here again, they felt, "it does not comport with the gravity and finality which should characterize an adjudication in the exercise of the original jurisdiction of this Court to proceed, at the instance of a State, in the absence of parties whose rights would be actually passed upon and be in effect determined, even though they might not be technically bound

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[25] *Ibid.*, at p. 263.

[26] *Minnesota* v. *Northern Sec. Co.*, 184 U. S. 199 (1902).

[27] 258 U. S. 158 (1922).

[28] *Ibid.*, at p. 163. See also: *Arizona* v. *California*, 298 U. S. 558.

[29] 262 U. S. 553 (1923).

in subsequent litigation in this, or some other tribunal".[30]

It is respectfully submitted, that the present opponent, a citizen of Louisiana, named by the State of Louisiana as a co-defendant in the proposed complaint in the instant proceeding, is a necessary and indispensable party thereto, "whose rights would be actually passed upon and be in effect determined" by any decree entered in such an action by this Court, even though he were not a party to the proceeding, and even though he would not "be technically bound in subsequent litigation in this, or some other tribunal"; and this Court accordingly lacks jurisdiction of the proposed action.

2—This Court should decline to take jurisdiction of this cause, because it is not a suit in equity, but is a simple action at law for an ordinary money demand, required to be tried by jury.

The complaint which the State of Louisiana proposes to file in this proceeding, is characterized by the State as one in equity, on a cause of action for which complainant alleges it has no adequate remedy at law, to rescind a contract, for discovery and accounting, and to avoid a multiplicity of suits. In truth and in fact, however, the ultimate relief for which the State prays in the proposed complaint, is merely a judgment for the payment of money on a cause of action arising out of rescision of contract; the amount for which recovery is sought, to be determined, under certain of the alternative pleas, by discovery and accounting.

The only multiplicity of suits averred, involves the suggestion of the State that the citizen of Louisiana can be

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[30] *Ibid.*, at p. 617. The report of the decision of *Ohio* v. *Helvering*, 292 U. S. 360, cited by counsel for the State of Louisiana, contains no indication as suggested by counsel, that citizens of the plaintiff State were joined as co-defendants in a separable controversy. All that this Court said was: "The bill alleges that the defendant Helvering is Commissioner of Internal Revenue, and that the other defendants are Collectors of Internal Revenue in the several Internal Revenue Districts of the State of Ohio." No contention was made as to jurisdiction; and this Court simply declined leave to file the complaint, since it failed to disclose a cause of action.

made a defendant in an action in that State only, whereas the other defendants can all be brought into Court only in New York; thus requiring two suits at law, instead of only one in this Court if original jurisdiction of this Court were sustained. This, despite the suggestion of the State that the suit against the citizen of Louisiana is separable, and may be dismissed without prejudice to the proceeding against the other defendants, should this Court find such dismissal necessary to sustain its original jurisdiction!

As long ago as 1886, this Court had occasion to hold that a bill praying for discovery, for rescision and cancellation of a contract, coupled with a money demand, with various alternative and additional pleas, was nevertheless an action at law, triable by jury under the Constitution. This Court held that the bill could not be maintained as a suit in equity, since "a judgment for pecuniary damages would adjust and determine all the rights of the parties, and is the only redress to which the plaintiffs, if they prove their allegations, are entitled".[31]

In a subsequent case,[32] this Court held that neither a demand for an accounting, the necessity of discovery, nor even an alleged multiplicity of suits gave rise to cause for the maintenance of a bill in equity, when the relief sought was merely a judgment for money. The equitable remedies suggested, said the Court, could all be made available incidentally in an action at law; and as to the plea of multiplicity of suits, "those persons who were guilty of the wrong, must be made parties in either court, in order to bind them. Such alleged multiplicity is not avoided in one court more than in the other."[33]

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[31] *Buzard* v. *Houston*, 119 U. S. 347, 353 (1886).

[32] *United States* v. *Bitter Root Development Co.*, 200 U. S. 451 (1906).

[33] *Ibid.*, at p. 478. Similarly, this Court has held that an action for damages arising out of a conspiracy to defraud, is justiciable at law, and not in equity, although the prayer for relief seeks discovery. *Curriden* v. *Middleton*, 232 U. S. 633 (1914). Even an action for injunction will not lie to avoid a "multiplicity of suits" when it appears that only two suits would be avoided. *Kohlhamer* v. *Smietanka*, 293 Fed. (D. C. Ill.-1917) 408.

The proposed action is accordingly simply one at law, seeking recovery of money. This was the situation in *Massachusetts* v. *Missouri*,[34] in which this Court held that to open its doors to such actions by the States "would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it". In such a situation, said this Court, it may properly withhold the exercise of the jurisdiction conferred upon it "where there is no want of another suitable forum".[35]

It must not be forgotten that any action taken by this Court becomes an important precedent for the future; and, as this Court has said, "in the matter of practice we are obliged to bear in mind, in an essential degree, the effect of every step taken in the instant case on those which may succeed it."[36]

If this Court were to permit the filing of the instant complaint, the precedent would give rise to rapidly multiplying actions of a similar nature. As recently stated by Mr. Justice Frankfurter in his dissenting opinion in *Texas* v. *Florida*:[37] "But if experience is any guide, the present decision will give momentum to kindred litigation . . . Legal doctrines have, in an odd kind of way, the faculty of self-generating extension. Therefore, in pricking out the lines of future development of what is new doctrine, the importance of these issues may make it not inappropriate to indicate . . . potential abuses to which the doctrine is not unlikely to give rise".

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[34] 308 U. S. 1, 17-19 (1939).

[35] Both the federal and state courts of various local jurisdictions are available to the complainant as "suitable forums" for the proposed action. See *Ames* v. *Kansas*, 111 U. S. 449 (1884); *Delafield* v. *Illinois*, 2 Hill 159 (1841).

[36] *Washington* v. *Northern Sec. Co.*, 185 U. S. 254, 256 (1902).

[37] 306 U. S. 398, 434 (1939).

The foregoing thoughts are particularly appropriate when applied to such an action at law for the recovery of damages as is involved in the proposed complaint in the instant proceeding. As has been demonstrated, the proposed action is simply one at law seeking a recovery of money. If the Court grants leave to file the complaint, the defendants will unquestionably avail themselves of the right secured them by the Seventh Amendment to the Constitution to demand trial by jury.[38] The thought that this Court might be required to sit, in the exercise of its original jurisdiction, to preside over a jury trial, if the doctrine for which the State of Louisiana contends were given sanction, renders it "not inappropriate to indicate potential abuses to which the doctrine is not unlikely to give rise".

It is accordingly respectfully submitted that this Court should decline leave to the State of Louisiana to file its original complaint in this Court in the instant proceeding.

Respectfully submitted,

Bon Geaslin,
Washington, D. C.,
Attorney for Appearer.

Washington, D. C.,
September, 1941.

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[38] "The trial of issues of fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury." 28 U. S. C. Sec. 343.